(1) Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

FRANCIS J. ROBINSON,

Petitioner,

v.

SUNBEAM CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Will this Court use its power under Supreme Court Rule 10(a) to prevent the Second Circuit Court of Appeals from ignoring the voluminous facts of record and approving multiple acts of violations of multiple Federal statutes by named co-conspirators in carrying out a massive fraud to deprive legitimate stockholders of their equity interests in a listed corporation and transferring new stock and all the corporate assets to themselves?

2. How could the Second Circuit Court of Appeals ignore and refuse to even consider any of the uncontradicted and proven facts of record showing that the Bankruptcy Court lacked statutory authority to confirm the Plan of Reorganization and that there was a proven conspiracy to defraud Sunbeam stockholders in a contrived and planned "bankruptcy" that never was?

3. Will this Court permit the Second Circuit Court of Appeals to ignore the specific wording of a Federal statute, ignore conflicting Circuit Court decisions, including one of its own panels in this case, and then attempt to hold that this panel's Summary Order cannot be used as precedent, "but may be called to the attention of this court in a subsequent stage of this case, in a related case, *or in any case for purposes of Collateral Estoppel or Res Judicata*", whether criminal or civil, thereby sending a message to the U.S. and world stockholders that the U.S. Federal Courts will not protect their investments in this country's corporations, at least in the Second Circuit? (Emphasis added).

4. How could the Second Circuit Court of Appeals ignore the fact that this was never a case of mootness, but a case from the very outset of Robinson's Notice of

Appearance in Bankruptcy Court a class action of Conspiracy to Defraud Sunbeam stockholders, fully litigated and the facts never controverted or even considered, and then use mootness by that Court as a pretext to avoid a decision on the merits after such a decision was directed by its own earlier panel in this case?

5. Since Petitioner is calling the Second Circuit's Order to the attention of this Court, as that Circuit Panel has "permitted", will this Court now recognize that Order in this subsequent stage of this case or in *any* related case, whether civil or criminal, for purposes of Collateral Estoppel or Res Judicata?

6. Considering question 5 above, what message will allowing the Second Circuit's Order to stand send to future corporate executives and others such as those involved here and similar to those in the recent *Enron* case, particularly where in this case the stockholders' losses can be recovered for them, the corporation restored to a strong financial condition, and with all the benefits of having had a class action already litigated on liability without an army of lawyers walking away with the major part of the recovery?

LIST OF PARTIES

Sunbeam Corporation and Petitioner are listed in the caption. Bank of America, Wachovia and Morgan Stanley, represented by Simpson, Thacher & Bartlett, while denying they are parties to this litigation, have been *de facto* parties throughout this entire bankruptcy proceeding and have been treated as such and served with all papers as such by Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Francis J. Robinson respectfully petitions for a Writ of Certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit in Docket No. 04-1381-bk.

OPINION BELOW

The Summary Order of the U.S. Court of Appeals for the Second Circuit is reprinted in the Appendix ("App.") beginning at App. A, p. 1a.

JURISDICTION

The Second Circuit Court of Appeals entered judgment on April 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 1129, (11 U.S.C. 1129) states:

1129. *Confirmation of Plan.*

(a.) The Court shall confirm a plan only of all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

* * *

(7) With respect to each impaired class of claims or interests

(A) each holder of a claim or interest of such class –

(i) has accepted the plan; or

(11) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date;

STATEMENT

Jerry Levin was CEO of Coleman and Executive V.P. of MacAndrews & Forbes when they sold Coleman and other Subsidiaries to Sunbeam. He testified at both his deposition and at the Confirmation Hearing that he "knew that Sunbeam was rendered insolvent at the very moment that it incurred the bank debt and undertook the acquisitions" and did not believe "it was a viable enterprise going forward from that moment." (Tr. p. 278).

While still CEO of Coleman, and before consummation of the sale, he had a series of blank notes to Sunbeam dated dated April 6, 1998, executed by him and other officers of Coleman and its subsidiaries. After taking over as Chairman and CEO of Sunbeam, he transferred $2.252 billion in cash from Sunbeam to Coleman and other subsidiaries of Sunbeam and Coleman and carried that total amount as debt on the books of Sunbeam (Tr. pp. 270-274) These were the same subsidiaries later "transferred" out of the Chapter 11 proceeding, with the accompanying cash, by Judge Gonzalez with the concurrence of Judge Chin, after the Confirmation Hearing and

while the appeal was pend[illegible]efore Judge Chin. (App. J, pp. 68a-70a).

Immediately after taking over as CEO of Sunbeam, Jerry Levin wrote down the value of Coleman on the books of Sunbeam by $1.1 billion, First Alert by $62.5 million, and sold Eastpack back to MacAndrews & Forbes (M&F) at a $52 million loss two years later. (App. I, p. 54a). On August 12, 1998, he entered into an agreement with M&F pursuant to which the Company was released from certain threatened claims of M&F and its affiliates arising from the acquisition of Coleman and M&F agreed to provide "certain management personnel and assistance" to Sunbeam in exchange for "certain warrants to purchase Sunbeam stock expiring in August, 2003." Levin was also Ex. V.P. of M&F at that time.

In cover letters of May 14, 1999 and May 11, 2000 to the Sunbeam Annual Report to Stockholders and the SEC, Jerry Levin withheld his knowledge of the planned bankruptcy and instead presented a glowing picture of the past and future of Sunbeam's business (Ex. B to App. 1a to Robinson Motion to Vacate in District Court; App. I, pp. 55a-56a).

In January 2000, long after he testified he knew that Sunbeam was going to be taken into bankruptcy, he had Sunbeam purchase the remaining 19½% of Coleman stock from M&F for $146 million in cash. He was still Ex. V.P. of M&F at that time. (App. brief, App. 1a, Ex. A, Annual Report of Sunbeam for 1999, p. 22; App. I, p. 55a)

It is clear from the admissions of Harvey Miller (Tr. pp. 4-7) and the testimony of Jerry Levin throughout his deposition and the Confirmation Hearing that the banks and Morgan Stanley were parties to and controlled

the Chapter 11 proceeding from the outset. See particularly Levin's admission under cross examination at pages 289-290 of the Transcript and his testimony as to his compensation and benefits negotiations (App. I, 56a-58a).

That the banks and Jerry Levin controlled all the proceedings is further made unquestionably clear in the November 25, 2002 transcript of the *ex parte* "Hearing" held after completion and closing of the Confirmation Hearing on the evening of November 20, 2002, the latter of which was held without any notice to Robinson and run by counsel for banks and Morgan Stanley and for the Creditors' Committee. (App. I, pp. 52a-53a; App. O, pp. 82a-87a).

The principal issue in this case is whether the Bankruptcy Court, the Federal District Court, and the latest panel of the Second Circuit Court of Appeals have acted in a legal, equitable manner, or have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers." (Supreme Court Rule 10(a))

The principal action of personnel in the Clerk's Office that is of concern is the fact that after Robinson's brief and appendix in this case was filed on November 17, 2004, there was nothing heard from Debtor's counsel or the Court until over 5 months later when Robinson received a copy of a Notice of Motion for Extension of Time which had earlier been refused for filing and replaced with a Motion for Reinstatement. At the bottom of the refused for filing Motion for Extension of Time, there was a statement signed by the Motions Staff Attorney stating that "IT IS HEREBY ORDERED

that the Motion to Reinstate Appeal is denied." (App. D, pp. 10a-12a)

It was after this that Robinson wrote directly to the members of the panel then involved, sending each member copies of the brief, appendix, Motion to Reconsider and other documents which it appeared obvious that the Court had not seen. (App. G, pp. 24a-34a). It was after another letter to the same panel on November 11, 2005, that the Motion for Reconsideration was granted. This second letter had gone into some detail concerning the class action nature of this case and the fact that the class had already been defined and established by Debtor and the banks as being the entire class of Sunbeam stockholders whose stock was being voided and the new stock issued to the banks and Jerry Levin and his management team. (App. H, pp. 39a-47a).

It has been over 45 months since Robinson filed, on September 13, 2002, a NOTICE OF APPEARANCE AND OBJECTIONS TO PROPOSED LOOTING OF LEGAL OWNERS SUNBEAM COMMON STOCK (App. H. pp. 42a-49a). In that LOOTING document, it was stated:

> "It was not the purpose of the bankruptcy laws to use the equity of the stockholders to pay off the debts of the corporation. The law provides for liquidation of the *assets* of the corporation to pay the debts, with any remainder going to the stockholders. The law does *not* provide for liquidation of the *stockholders.*" (App. H, p. 46a).

It was made quite clear to counsel for Debtor and for Wachovia, Bank of America and Morgan Stanley that Robinson was representing himself and "the entire class of Common Stockholders of Sunbeam Corporation, to

represent all as their interests may appear." (App. H, pp. 40a-, 43a). The Bankruptcy Court and the U.S. Trustee in Bankruptcy had previously denied requests to appoint a shareholders' committee, ruling long prior to the Confirmation Hearing and without any evidence whatever of the required liquidation value of Sunbeam assets, that there would be nothing left for stockholders after payment of the banks' and Morgan Stanley debt. Debtor's and the banks' and Morgan Stanley counsel had objected to such appointment on the stated ground that it would be a dissipation of the corporation's funds since there was going to be nothing left for stockholders in any event. (App. P, p. 88a).

During the Confirmation Hearing of November 20, 2002, Harvey Miller, trial counsel for Sunbeam, admitted that Robinson disputed the following:

1. That the liquidation value of Sunbeam was wholly inadequate to provide value to any equity interest holders (Tr. pp. 30-31).

2. Sunbeam had met its burden of proof as to value, best interest, or that "The plan has been proposed in good faith and not by any means forbidden by law." (Tr. pp. 28-31).

He did, however, admit that "The issue today is whether the plan of reorganization complies with the provisions of Section 1129." (Tr. p. 44).

The only witnesses presented to carry the burden of proof on Section 1129(a) were Mr. Greene with regard to his Valuation Analysis and Mr. Frederick, Senior V.P. of Finance of Sunbeam, as to his so-called liquidation analysis. This was admitted on the record by Judge Gonzalez (Tr. p. 289) and so stated in his Confirmation Order (App. I, p. 63a, Tr. p. 284).

Upon cross examination of Mr. Greene by Robinson, who had subpoened Greene and Jerry Levin, CEO of Sunbeam, (Tr. pp. 129-131), Greene admitted that he had made no independent valuation nor had anyone else do so for the assets of Sunbeam and its subsidiaries. (Tr. pp. 87-88). His Valuation Analysis had nothing to do with the value of Sunbeam and its subsidiaries' assets. Whereupon, Mr. Miller interrupted the cross examination and stated, "We will stipulate that Mr. Greene and his organization, Miller, Buckfire, did not do a physical appraisal of physical assets." (Tr. p. 88).

The following exchange then took place between Robinson and Greene (Tr. p. 88):

> Q. Okay. Now if Mr. Frederick's liquidation analysis is based on your financial analysis, then that is not based on any valuation of assets, is it?
>
> Interjection by Mr. Miller: "We just stipulated to that."

Then, at pages 89-90 of the transcript, Greene admitted that he had "no knowledge of the value of the foreign subsidiaries, local subsidiares, the buildings, or anything like that." At this point, Judge Gonzalez interrupted, stating, "They have already stipulated that he doesn't." When Frederick testified under cross examination by Robinson, he admitted that he had no basis whatever for his "liquidation analysis", except for his opinion and what was contained in Greene's Valuation Analysis and testimony (Tr. pp. 100-108).

Consequently, there was not a scintilla of evidence of the requirements of Section 1129(a), Debtor had introduced no evidence whatever to carry its burden of proof under 1129(a), and Judge Gonzalez had no authority to confirm the Plan of Reorganization.

Both the District Court and the second panel of the Court of Appeals in this case have ignored the repeated, established facts in this case showing beyond any dispute that the Confirmation Order involved here is statutorily invalid on its face, and despite the ruling of the first panel that Debtor was to brief and respond to Robinson's brief and appendix so that there could be a decision on the merits in this case (App. B, pp. 6a, 7a; App. C, pp. 8a, 9a).

The Second Circuit panel issuing the Summary Order in this case has simply rubber-stamped the patently erroneous and factually unsupportable findings of the District Court that Robinson should have moved for a stay to halt the illegal proceedings under the invalid order, instead of looking at the fact that the entire Order was invalid to begin with and that Robinson had raised that issue repeatedly at every stage of the proceedings in this case.

It made no sense to proceed for a stay when the claim and evidence showed the invalidity of the Confirmation Order and a request for stay would have been both inconsistent and futile in any event since previous requests for such a stay had been summarily denied by the same District Court below. As a matter of fact, that was the reason that the Debtor used to obtain a transfer to Judge Chin and to delay the case and allow even more time to complete more illegal acts under that Order.

REASONS FOR GRANTING THE WRIT

There is confusion now existing in the Circuits and other courts below as to exactly what affect the *Chateaugay* case has in a case where mootness is claimed in a bankruptcy case. In any event, this Sunbeam case is the

first case where the Circuit Court that decided that case has ruled that it will apply to a situation where the underlying Confirmation Order of the Bankruptcy Court, even though invalid on its face, and created by a conspiracy to defraud stockholders, simply because "substantially all" the illegal acts set out in that illegal Order have been accomplished in a frantic 12 day period after its issue and while an appeal is then pending before the same Circuit Court that had issued that *Chateaugay* decision to begin with.

As Robinson pointed out to the panel hearing the oral argument in this case on April 24, 2006, such an interpretation of *Chateaugay* is ridiculous. It is exactly just as ridiculous as holding that an embezzler cannot be indicted or prosecuted because the embezzler has quickly gone out and spent the money before being caught.

Both the Federal District Court and the Second Circuit Court of Appeals have held that the *Chateaugay* case can be used to cover up both civil and criminal acts performed in carrying out the provisions of a Confirmation Order invalid on its face, simply by those courts ignoring the fact that in the *Chateaugay* case there was never any question of the validity of the Confirmation Order. Consideration of this issue is of extreme importance in protecting the integrity of this country's securities markets and maintaining the confidence of current and future investors that their investments will be protected by enforcement of the laws and regulations by the appropriate courts and agencies of this country.

The actions of the Bankruptcy Court, the Federal District Court, of certain personnel in the Clerk's Office and the second panel of the Second Circuit Court of Appeals in this case have "so far departed from the

accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." (Supreme Court Rule 10a).

Before this Summary Order decision by the same Circuit Court that decided *In Re Chateaugay Corp.*, 10 F.3d 944 (2d Cir. 1993), there was some confusion among the Circuit Courts as to the scope of its application. That same Court has now, by affirming the decision of the District Court below in summary fashion, without there ever having been a decision on the merits, expanded the scope of its application to cover even a case where the Confirmation Order was invalid in its inception and all the illegal acts done pursuant to that order will stand.

The Second Circuit Court panel in this case cited the Third Circuit case of *In Re Continental Airlines,* 91 F.3d 553 (3d Cir. 1996), as suggesting abuse of discretion review of the district court's balancing of equitable and prudential factors and "Robinson's lack of diligence" in not seeking a stay. In the *Continental Airlines* case, Judge Alito wrote a dissenting opinion, joined in by five of the other *en banc* panel members. In that dissent, Judge Alito stated (pp. 572-573):

> "C. One final aspect of the majority opinion warrants a response, and that is the majority's discussion of the Trustees' failure to seek or obtain a stay. I have two comments regarding this discussion.
>
> First, while it might be desirable to have a rule that flatly requires a stay whenever a party takes an appeal that might upset a plan of reorganization, neither the Bankruptcy Code nor the Bankruptcy Rules contain any such sweeping provision;

our court had not adopted any such rule at the time of the Trustees' appeal[7] (and, indeed, still has not done so); and it would consequently be unfair to apply such a rule to the Trustees retroactivly.

Second, in the absence of such a blanket rule, we should focus on whether the purposes that would be served by a stay require that the Trustees be thrown out of court at the threshold. The purpose of a stay in this context is to prevent transactions that might otherwise occur in reliance on the plan of reorganization and that would be difficult or painful to undo if the appeal were to succeed. Accordingly, the Trustees' failure to obtain a stay in this case might limit the relief that would be available to them if they succeeded on the merits of their appeal, but it cannot justify the refusal at the outset even to consider their arguments.

In sum, I believe that the Trustees' claim should be entertained on the merits. The mere act of entertaining that claim would not imperil Continental's reorganization or impair any legitimate reliance interests. If the Trustees' claim were considered and they won on the merits, any threat to the reorganization or to legitimate reliance interests could be taken into account in framing the Trustees' relief. What the district court and the majority have done – throwing the Trustees out of court before the merits of their claim are even heard – is unjustified and unjust.

For these reasons, I respectfully dissent. I would reverse the order of the district court and remand for a decision on the merits."

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[7] In *In re Joshua Slocum, Ltd.* 922 F.3d 1081, 1085 (3rd Cir. 1990) (footnote omitted), we noted that "only

[footnote continued]

> two provisions of the Bankruptcy Code, 11 U.S.C. §§363(m) and 364(e), specifically require that a party seek a stay pending appeal,' and we "decline[d] to interpret the mootness principles in such a way that would, in effect, create a third situation where parties are required to seek a stay."

In the case of *In Re Zenith Electronics Corp.*, 329 F.3d 338 (3rd Cir. 2003), Judge Becker wrote the opinion and reversed the district court's dismissal of an appeal for mootness and stated, "We have determined that an appeal is constitutionally moot 'only if events have taken place that make it impossible for the court to grant any effective relief whatever.' ", citing *Church of Scientology of Cal. v. United States*, 506 U.S. 912, 113 S.Ct. 447, 121 L.Ed. 313 (1992). Judge Becker had joined Judge Alito's dissent in the earlier *Continental* case cited above.

Here, it definitely is not impossible for the Court to grant effective relief. In fact, it is exactly the opposite. The facts establishing the Conspiracy to Defraud the Sunbeam legitimate stockholders have never been rebutted or questioned by counsel for Debtor or the banks throughout at least three full briefings, the Confirmation Hearing, motions, seeking of judge changes and all other activities connected with the appeals. Unlike the *Enron* case, this case does not have to go through a tortuous trial relying to a large extent on circumstantial evidence. This is a case where the shareholders' losses can be recovered for them, and the corporation can be restored to a strong financial condition for their benefit, with all the benefits of having had a class action already litigated for the stockholders without an army of lawyers walking away with the major part of the recovery. (See App. K, Attachment, Proposed Remedies and Damages; App. L, pp. 75a-78a).

In any event, without even discussing the scope or application of the mootness doctrine, this case can be decided on the unquestioned evidence of record, including the admissions of Debtor's and the banks' counsel and witnesses, as a simple case of conspiracy to defraud, with further hearing or procedure to establish damages, sanctions or other possible protections or benefits for the stockholders owning at that time. (App. H., pp. 40a-41a).

Even if the mootness doctrine set out in *Chateaugay* were to apply, all those points set out therein for non-application are met under the facts in this case. The Court "can still order some effective relief" and the corporation will then emerge in an even much stronger condition that it was in than when taken over by Coleman and Jerry Levin. Also, any requirement for a stay order in this case would enforce such a sweeping rule as to be inequitable and unconscionable (See *Continental Airlines, supra,* Alito dissent, p. 567).

CONCLUSION

The Bankruptcy Court had no legal authority to confirm the Plan of Reorganization under the facts in this case. The District Court and the Second Circuit Court of Appeals erred in refusing to decide that issue on the merits, assuming legality of the Confirmation and dismissing the appeal for mootness based on "substantial completion" of the illegal acts set out in the Plan of Reorganization. The facts supporting the charge set out in all phases of this case of Conspiracy to Defraud have been proven and there is no question of dispute of any of the material facts. Petitioner requests Summary Judgment on that issue and return to the lower court for

a hearing or procedure to establish damages, sanctions, or other possible protections or benefits for the stockholders whose equity interests were misappropriated.

Respectfully submitted,

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